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HIGH COURT OF CHHATTISGARH AT BILASPUR

First Appeal No. 186/2003

Ram Dulare and another

Vs.

Mahendra Pal and another

Single Bench: Hon'ble Shri **Dilip Raosaheb Deshmukh, J.**

Post for Judgment: 3 / -08-2007

Sd/-
Dilip Raosaheb Deshmukh
Judge

HIGH COURT OF CHHATTISGARH, BILASPUR

Before: Hon'ble Shri Justice Dilip Raosaheb Deshmukh

F. A. No.186 of 2003

APPELLANTS DEFENDANTS : 1. Ram Dulare S/o. Bhagwandas, aged about 34 years, Caste-Yadav, Resident of Shaktivihar, in front of Krishna Talkies and Risali Bhatha, Azad Market, near : Kanhaiyamurti, Risali, Bhilai, Durg (C.G.)

: 2. Harihar Yadav S/o. Bhagwandas, aged 45 years, Caste-Yadav, Occupation: Dairy Farm, Resident of Shativihar, in front of Krishna Talkies and Risali Bhatha, Azad Market, near : Kanhaiyamurti, Risali, Bhilai, Durg (C.G.)

Versus

RESPONDENTS : 1. Mahendra Pal S/o. Ram Lakhan Pal, aged about 35 years, Resident of Maitri Nagar, Bhilai, Durg (C.G.)

: 2. State of Chhattisgarh, Through: Collector, District Collectorate, Durg (C.G.)

CIVIL APPEAL UNDER SECTION 96 OF THE CODE OF CIVIL PROCEDURE

Present:

Shri B. P. Mishra, counsel for the appellants.
Shri Rajiv Shrivastava, counsel for respondent No.1
Shri Akhil Agrawal, P.L. for respondent No.2/State

JUDGMENT

(Delivered on this 31st day of August, 2007)

Being aggrieved by the judgment and decree dated 27.08.2003 passed in Civil Suit No. 25A of 2002 by the 8th Additional District Judge

(F.T.C.), Durg, granting specific performance of the contract, the appellants/defendants have preferred this first appeal.

2. Brief facts are that the respondent No.1/plaintiff instituted a Civil Suit for specific performance of contract pleading that on 24.12.1994, the appellant No.1/defendant had agreed to sell land Kh.No.483/8 area 0.002 acres situated in village Risali, revenue circle Durg (hereinafter referred to as the suit land) for a consideration of Rs.75,000/-, after having received Rs.50,000/- as earnest money and had executed an *Ekrarnama* Ex.P.1. It was agreed that the registered sale deed would be executed by the appellant No.1/defendant on 31.12.1995 after receiving the remaining consideration of Rs.25,000/-. The respondent No.1/plaintiff was put in actual possession of the suit land by the appellant No.1/defendant on 24.12.1994. Since the appellant No.1/defendant did not execute the sale deed despite repeated requests, the respondent No.1/plaintiff served a notice dated 1.7.1996 on the appellant/defendant No.1 and also made a publication on 2.7.1996 in the daily "Dainik Bhaskar". Notice was not served as the whereabouts of the appellant/defendant No.1 were not known. On 10.7.1996, the appellant No.1/defendant sent a notice alleging that the agreement alleged to have been executed by him on 24.12.1994 was a forged document. The respondent/plaintiff was always ready and willing to perform the contract. On 19.8.1996, the appellants/defendants dispossessed the respondent No.1/plaintiff by making unauthorized construction over the suit land. On these premises, the respondent No.1/plaintiff prayed for specific performance of the contract and also for being put in possession of the suit land. Relief of permanent injunction to

restrain the appellants/defendants from interfering with his possession was also prayed.

3. The appellants/defendants resisted the suit denying the plaint allegations in *toto* and pleaded that the defendant No.1 did not either enter into or execute any agreement with the respondent No.1/plaintiff on 24.12.1994 and also did not receive Rs.50,000/-. It was also pleaded that the suit land was the property of joint Hindu Family and could not be alienated by the appellant No.1/defendant alone. The appellants/defendants were carrying a dairy business on the suit land and had 15 she-buffaloes in the dairy. Upon reading of publication made by the respondent No.1/plaintiff, the appellants/defendants served a notice on 10.07.1996 upon the respondentNo.1/plaintiff and had also denied the allegations made by the plaintiff by making a publication. The respondent No.1/plaintiff was never put in possession of the suit land. As the plaintiff was, on the basis of a forged document, trying to somehow grab the suit land, he was not entitled to the relief sought for.

4. The trial Court framed as many as six issues. The respondent No.1/plaintiff, besides examining himself, examined the attesting witnesses of the *Ekrarnama* Ex.P.1 dated 24.12.1994 i.e. Birendra Kumar P.W.3 and Nemichand P.W.4 and also adduced the evidence of Ulhas Athale P.W.2, hand writing expert, to prove that the document Ex.P.1 dated 24.12.1994 was signed by the appellant No.1/defendant.

5. On the other hand, the appellants/defendants examined themselves and denied execution of the agreement dated 24.12.1994.

The defendants also got the disputed signature on the revenue stamp affixed on Ex.P.1 examined by a handwriting expert-Sanjay J. Kotwal and obtained report dated 10.03.1997 wherein it was opined that the disputed signature on Ex.P.1 is not in the handwriting of the appellant No.1/defendant.

6. It is also pertinent to note that after the appellants/defendants had examined themselves before the lower court on 22.7.2003 an opinion was expressed by the lower court on record that there was no substance in the litigation and parties should compromise. It appears that in view of such an opinion expressed by the lower Court neither the appellants/defendants examined the handwriting expert nor did the lower court think it necessary, in the interest of justice and in view of a contrary opinion expressed by the handwriting expert examined by the respondent/plaintiff, to summon Sanjay J. Kotwal as a court witness.

7. Although the scribe of the document *Ekrarnama* Ex.P.1 was not examined and the attesting witnesses Birendra Kumar P.W.3 and Nemichand P.W.4 did not support the plaintiff's case, the lower Court granted a decree for specific performance of the contract on the ground that the testimony of Birendra Kumar P.W.3 and Nemichand P.W.4 contained an element of falsehood and it appeared that despite admitting their signatures on Ex.P.1 they were favouring the appellants/defendants. Relying on the testimony of handwriting expert Shri Ulhas Athale P.W.2 and making an overall assessment of the evidence, it was held in paragraph 30 that the testimony of Birendra Kumar did indicate that the appellant No.1/defendant had, after receiving Rs.50,000/- as advance,

agreed to sell the suit land to the respondent/plaintiff and had executed the document Ex.P.1.

8. Shri B.P.Mishra, learned counsel for the appellants/defendants argued that the finding recorded by the lower Court regarding proof of execution of the agreement Ex.P.1 by the appellant No.1/defendant is perverse. It was submitted that if the appellant No.1/defendant was ready and willing to sell the suit land for a consideration of Rs.75,000/- to the respondent/plaintiff on 24.12.1994 and had received Rs.50,000/- as advance and had put the respondent No.1/plaintiff in possession of the suit land on 24.12.1994, there was no necessity to prolong the registration of the sale deed for more than a year i.e. till 31.12.1995. It was further submitted that there was no evidence to show that the respondent No.1/plaintiff was, at any time, put in actual possession of the suit land and was dispossessed by the appellants/defendants later. As regards the document Ex.P.1, the learned counsel for the appellants/defendants submitted that the testimony of the plaintiff in paragraph 25 left no room for any doubt that the document Ex.P.1 was a forged document because it was admitted by the respondent No.1/plaintiff that merely on the basis of the mention of the name of the appellant No.1/defendant in typed letters below the signature, the respondent No.1/plaintiff had stated that the signature belonged to appellant No.1/defendant. It was also stated by the respondent No.1/plaintiff that he had no knowledge as to who had typed the document. Although the respondent No.1/plaintiff deposed that there was only one stamp affixed on the Ex.P.1, a perusal of the document Ex.P.1 showed that another stamp affixed on it had been removed and a

new stamp at portion 'A to A' was affixed. Learned counsel argued that the testimony of Birendra Kumar P.W.3 in paragraph 6 left no room for any doubt that the document was a forged document because this witness admitted that the respondent No.1/plaintiff had taken his signature at his residence and had further admitted in paragraph 5 that the appellant No.1/defendant did not sign in his presence. On these premises, it was argued that the plaintiff did not come to the Court with clean hands and was not entitled to the discretionary relief for specific performance of contract. Reliance was placed on ***Chenguni Othayoth Thankom*** v. ***Kooloth Balakrishnan Nair,*** AIR 2002 Kerala 297.

9. On the other hand, Shri Rajeev Shrivastava, learned counsel for the respondent No.1/plaintiff argued in support of the impugned judgment while contending that both the witnesses Birendra Kumar P.W.3 and Nemichand P.W.4 were close to the appellants/defendants and were deliberately suppressing the truth. Both admitted their signatures on Ex.P.1 and also the fact that the appellants/defendants were in need of money. It was urged that the lower court had, on a proper appreciation of the evidence and all the attending circumstances, correctly recorded the finding in favour of the respondent/plaintiff while granting a decree for specific performance of contract. Reliance was placed on ***Dattatraya*** v. ***Rangnath Gopalrao Kawathekar, (dead) by his legal representatives and others,*** AIR 1971 SC 2548.

10. Having considered the rival submissions, I have perused the record. In view of the fact that the appellants/defendants had denied execution of the document Ex.P.1 and pleaded that it was a forged document, the

burden of proving execution of the document dated 24.12.1994 by the appellant No.1/defendant was entirely on the respondent No.1/plaintiff. A perusal of the document Ex.P.1 shows that it is a typed document. At portion 'A to A', a revenue stamp is affixed bearing a signature and another revenue stamp, which had been affixed on the document, had been removed. In paragraph 25 of his testimony the respondent No.1/plaintiff did not offer any explanation and lied that there was only one stamp affixed on the Ex.P.1.

11. Execution of the document by the appellant No.1/defendant could be proved either by examining the attesting witnesses or the scribe. The respondent No.1/plaintiff admitted in paragraph 25 that the appellant No.1/defendant had got the document typed from somewhere and so he did not know as to who had typed the document. Obviously such a statement was made to avoid explaining non-examination of the scribe by the respondent No.1/plaintiff.

12. Attesting witnesses Birendra Kumar P.W.3 and Nemichand P.W.4 did not support the respondent/plaintiff regarding execution of the agreement to sell the suit land by the appellant No.1/defendant on 24.12.1994. The testimony of Birendra Kumar P.W.3 shows in paragraph 3 that no transaction took place in his presence and he signed the document as a witness on the mere say of the respondent/plaintiff. He further deposed in paragraph 6 that the respondent/plaintiff had come to his house for obtaining his signatures. Similarly, Nemichand P.W.4, who is a barber, deposed that in his shop some talks had taken place between

the respondent/plaintiff and the appellant No.1/defendant relating to some money transaction in which the appellant No.1/defendant had demanded Rs.15,000/- - Rs.20,000/- from the respondent No.1/plaintiff which he assured to pay at his residence. He specifically denied that the appellant No.1/defendant had agreed to sell the suit land to the respondent/plaintiff for a consideration of Rs.75,000/-. In this manner, the testimony of the attesting witnesses Birendra Kumar P.W.3 and Nemichand P.W.4 did not support the respondent/plaintiff in any manner for proving execution of document Ex.P.1 by the respondent No.1/defendant on 24.12.1994.

13. As regards the payment of Rs.50,000/- as part consideration to the appellants/defendant on 24.12.1994, the testimony of respondent No.1/plaintiff-Mahendra Pal is unworthy of credit. In paragraph 26, he admitted that he was a teacher by profession and used to give the entire tuition fees to his father, who had provided Rs.50,000/- to him. Father of the plaintiff was not examined. No evidence was led to show whether such a huge amount was withdrawn from some Bank or why the respondent No.1/plaintiff was interested in purchasing the suit land.

14. The wholly unrebutted testimony of the appellant No.1/defendant Ram Dulare that he is conducting dairy business on the suit land is substantiated by the photographs of the suit land filed in the suit. The respondent No.1/plaintiff admitted in paragraph 15 that the appellants/defendants were running a dairy business on the suit land. Thus, the suit land was not vacant land on the date of agreement and had a full-fledged dairy established on it. Therefore, the testimony of respondent No.1/plaintiff that on 24.12.1994 the appellants/defendants

had agreed to sell an open piece of land to him and some open vacant plot had been measured prior to the execution of the agreement is wholly unreliable.

15. It is also pertinent to note that respondent/plaintiff had led no evidence to show that he was put in possession of the suit land on 24.12.1994 and was dispossessed in the year 1996 by the appellants/defendants. This further renders the case of the respondent/plaintiff unworthy of any credit. As against this, the testimony of the appellant No.1/defendant Ram Dulare that he did not execute any agreement on 24.12.1994 and also did not receive Rs.50,000/- from respondent/plaintiff is wholly unrebutted in cross-examination. The lower Court has, on mere conjectures and surmises, recorded a finding that execution of the agreement to sell the suit land by the appellant No.1/defendant was proved whereas there is no legal evidence on record to substantiate such a finding. The finding recorded by the lower Court is thus perverse and is liable to be set aside.

16. It also needs to be noticed that while Sanjay J. Kotwal, the handwriting expert of the appellants/defendants, had submitted a report in favour of the appellants/defendants, another handwriting expert i.e. Ulhas Athale had submitted a report in favour of the respondent No.1/plaintiff. Thus both experts were supporting the case of their clients. Examination of questioned documents by a handwriting expert is a science which is well established yet the very fact that both experts had expressed divergent opinion on the same document rendered such reports unworthy of credit. The lower Court, before pronouncing judgment, also ought not

to have placed it on record that the suit lacked substance. In the facts and circumstances, the trial Court before placing any reliance on the testimony of Ulhas Athale P.W.2 ought to have summoned Sanjay J. Kotwal as a court witness in order to arrive at a proper conclusion and for doing substantial justice between the parties.

17. In the result, the appeal is allowed. The impugned judgment and decree is set aside. The suit is dismissed. In the facts and circumstances, parties shall bear their own costs.

Sd/-
Dilip Raosaheb Deshmukh
Judge

Anjani